

A New Castle City Board of Adjustment Hearing took place on August 24, 2011 at 7 p.m. in the City of New Castle's Town Hall.

Present: William J. Barthel, City Council President*
Daniel R. Losco, City Solicitor
David J. Athey, City Engineer

City Personnel: Jeff Bergstrom, City Code Official

*President Barthel is representing Mayor Donald Reese.

President Barthel called the meeting to order at 7 p.m. Roll call was taken.

Mr. Losco noted for the record that he will be recusing himself from deliberations/discussion because he has provided legal advisement to the Historic Area Commission (HAC) on this matter, but will be available for legal or procedural questions that may arise.

President Barthel read the Notice of Public Hearing that states, "An application has been filed by Katherine Klyce, 108 West 3rd Street, New Castle, Delaware, appealing a decision of the Historic Area Commission issuing a certificate of compliance and permitting issuance of a certificate of occupancy for a new residence on property located at 101 West 3rd Street, New Castle, Delaware, parcel number 21-018.0-009.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Wednesday, August 24, 2011, at 7 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Streets, New Castle, Delaware."

An affidavit of publication was published in the News Journal and the New Castle Weekly. Mr. Bergstrom testified the property has been properly posted.

Mr. Bayard Marin, counsel for Mrs. Klyce, presented to the board starting with a history of why they are appealing HAC's decision of 7/15/11. The Board of Adjustment sits in review of HAC and the board's job is to review HAC's actions for determining whether there was substantial evidence to support its decision on this matter. He said case law states the standard for review for HAC is whether it made its decision in an arbitrary and capricious manner. He presented two (2) exhibits to support his argument. (*Exhibit K-1 Anthony Janaman v. New Castle County Board of Adjustment and John David Chadwick. Exhibit K-2 Albert J. & Patricia Riedinger v. Board of Adjustment of Sussex County, Dominic A. Marra and Leslie D. Marra.*) His argument is that HAC did not meet the requirements of substantial evidence; the board made its decision on insubstantial evidence to support its conclusion. The board acted on impression rather than on the facts presented; therefore, the decision should be reversed.

Mr. Marin distributed copies of the Special HAC Meeting minutes dated 7/13/11 as transcribed by a court reporting firm. (*Exhibit K-3.*) He then referenced HAC's meeting minutes dated 7/21/11, and the Board was provided a copy to review. Mr. Losco noted for the record that these minutes have not yet been approved. HAC will meet on 8/25/11 and address at that time.

Mr. Marin continued his presentation. He said there was no evidence about hardship presented to HAC. However, three (3) members of HAC made their decision based on hardship.

He then talked about the height of the building. In September 2007 HAC decided the building was too high, too massive, and did not approve a historic area certificate. Four (4)

additional hearings on this case followed. Drawings (8/20/07) were submitted (*Exhibit K-5*). The drawing shows the code height is 35 ft. The height proposed to the peak of the roof at its highest point was 34 ft., 4 in. The building was built to 34 ft., 4 in. In the HAC decision that decided against the applicant 34 ft., 4 in. This was reduced to 33 ft., 7 in. through subsequent hearings/representations requested by the applicant.

Looking at the drawing (1/7/09) the measurement of the building is from the grade 17 line. (*Exhibit K-5*). The applicants submitted drawings based on the 17 ft. line. Mr. Marin referenced another drawing submitted for the 4/30/09 hearing (*Exhibit K-5*). The starting point is the 17 ft. line. A professional engineer measured the current height of the building and it is 34 ft., 4 in., which is what was rejected four (4) years ago.

Mr. Athey asked for clarification on what HAC decision the applicant is appealing. Mr. Marin said there are a series of HAC decisions, but specifically those dated 4/30/09 and 5/21/09 where the height of the building was reduced down to 33 ft., 7 in. After the building was built, HAC decided on 7/13/11 to disregard the height making the decision arbitrary and capricious.

A report (*Exhibit K-6*) was prepared by civil engineer Jim Lober, and presented to HAC, showing the building was supposed to be 33 ft., 7 in. and was built to 34 ft., 4 in.

Mr. Barthel asked Mr. Marin if he believes that all other HAC decisions are arbitrary and capricious. The original HAC decision was based on drawings while the final decision was based on what was physically built. Mr. Marin said HAC came to a decision September 2007 to reject a building because it was too high. Through a series of hearings thereafter the height was reduced and in May 2009 Sally Monigle (Chair) voted to approve the historic area certificate on the basis the building had been reduced in size to 33 ft., 7 in.

Mr. Marin reiterated the argument is the applicant agreed to a height of 33 ft., 7 in. which HAC thought was a significant enough reduction to grant a historic area certificate and they should have complied with that height.

Mr. Athey referenced Mr. Lober's plans to the city that show 34 ft., 1 in., which were approved. Ultimately they came back at 34 ft., 4 in. The approved plans differ by a few inches from what HAC decided on. Mr. Losco suggested Mr. Marin address HAC's decision at its 7/13/11 special meeting to amend the height. (*The Board was provided a copy of the 7/13/11 minutes and reviewed same before continuing discussion.*)

Mr. Marin distributed to the Board an excerpt of the 4/30/09 HAC meeting (p.27) (*Exhibit K-8*) showing the applicant's architect Todd Breck's representation that they are at 33 ft., 7 in. then at 32 ft., 10 in. then 31 ft., 1 in. It is clear they presented to HAC the building height would be 33 ft., 7 in. HAC's decision was then appealed to the Board of Adjustment. At that Board of Adjustment hearing (4/30/09) Mr. John Tracey, counsel for the Marini's, represented that 34 ft., 1 in. at the tallest point, 33 ft., 4 at the mid point, and 32 ft., 7 in. at the end point. Those were again reduced during the course of the hearing by an additional 6 inches. He argued the architect and attorney for the Marini's represented 34 ft., 7 in. to the Board of Adjustment on 4/30/09. The drawings submitted to Mr. Bergstrom at 34 ft., 1 in. but built it to 34 ft., 4 in. The building was ultimately built to a height of 34 ft., 4 in.

At the 4/30/09 HAC meeting the vote was tied 2-2 to approve the drawing submitted by the applicant. HAC determined through Council that Sally Monigle (absent at 4/30/09 meeting)

could cast the deciding vote based on the recording. Part of her voting rationale was due to the applicant's "further concession in the height of the building by about 6 inches..." (*Exhibit K-10*) That decision was appealed to the Board of Adjustment who upheld HAC's ruling. They are now awaiting a decision from their appeal to the Superior Court.

Mr. Marin maintains the building was built 9 inches too high, and HAC changed their vote based on the reductions in the height of the building. This also applies to the other two levels that were reduced 9 inches in height.

Mr. Athey stated it is nearly impossible to build something exactly as designed and asked Mr. Bergstrom if it is unusual for a building of this size to be "off" by 3 inches either way. He concurred with Mr. Athey's statement.

Mr. Bergstrom was asked about HAC's ruling that the building not be higher than 33 ft., 7 in. but the city approved the plans at 34 ft., 1 in. Mr. Bergstrom is unsure what HAC said when they allegedly lowered the building 6 inches. He does not believe the drawings submitted would not be of much consequence when building an IRC home. (*Additional discussion followed.*)

Mr. Barthel asked Mr. Marin if he is saying the height difference (9 in.) negatively impacts his client and if that is the case, how does it impact her. Mr. Marin said one of the reasons people move into a historic district is because they know the neighborhood will be preserved to keep it up to certain standards. Aesthetics is also an issue in a historic district. Ms. Klyce has standing in this matter and has the right to challenge this decision. He cannot put a monetary figure on the hardship.

Mr. Bergstrom said the allowable height in the district is 35 ft. to the mean height of the upper roof.

Mr. Marin maintains that all the drawings submitted are based on the 17 ft. line. He noted that at the 7/13/11 HAC meeting civil engineers for both sides were present and their measurements were within 2/100s of an inch off. The question is how the measurements are calculated.

HAC can change the plan but it must be done based on fact and reasoning along with substantial evidence. Mr. Marin says HAC did not have that substantial evidence to make a decision. There is nothing in the city code or guidelines for HAC that permits them to decide anything based on hardship. And if hardship were permitted, the applicant did not provide any evidence of hardship to HAC.

Mr. Barthel asked Mr. Marin what his remedy to the height issue would be. He thinks the roof should be lowered by 9 in. and does not believe it would be a hardship, based on who we are talking about. It should be returned to HAC for a suggested remedy. Mr. Athey asked what happens if the applicant doesn't receive a historic area certificate. Mr. Marin said they would not be able to obtain a certificate of occupancy.

Mr. Marin referred to the 7/13/11 Special HAC Meeting (p.64) (*Exhibit K-3*), reviewing the motion and each member's rationale for HAC's decision to "amend their previous decision from whatever it is to whatever the building is today." The motion was made by Mr. Heckrotte and seconded by Mr. McDowell.

Mr. Marin commented that the City of New Castle's historic district is one of the most previous in the country. New construction in a historic district must be considered very carefully. Mr. Marin closed his testimony at this time.

Mr. John Tracey, counsel for the Marini's, addressed the Board. The point of the argument tonight is were the actions of HAC arbitrary and capricious when on 7/13/11 they decided to amend their prior decision to approve the height of the building as it is presently constructed. "Arbitrary and capricious" is defined as being taking without consideration, no disregard of the facts and circumstances of the case. The burden to demonstrate this is on Mr. Marin's client. It is not the Board of Adjustment's responsibility to substitute its judgment for HAC on matters of HAC's discretion. The sole issue tonight is the height issue of 33 ft., 7 in., 34 ft., 1 in., and 33 ft., 4 in. These measurements are within the city code height of 35 ft. Depending on how you measure they are either 8 in. below or 5-6 ft. below. The Board of Adjustment considered this application on appeal from the HAC in summer 2009. The building permit was issued but put on hold and construction was stopped for a time, then began again in late 2010. At that time Mr. Marin raised the height issue on behalf of his client for the first time. Communication between his client's engineers took place with Mr. Bergstrom on how to measure that Mr. Bergstrom referenced earlier in this hearing about mean height. According to the city building code the height of our structure is 32 ft. based on mean height, from the mid-point of the roof and calculate.

Mr. Athey asked if HAC is using the same point of reference. Mr. Tracey said either measurement is within the code. Mr. Bergstrom's office was not given direction by HAC on how to measure the height. There was no discussion as to what the city code required from a measurement standpoint. Between his engineers and the city building department his engineers were given information on how to measure using the international building code. Once that was presented to the city we said we were at approximately 30 ft. and continued to build.

The height issue was first raised in the January 2011 HAC Meeting. At that time HAC was deferring to the city solicitor and building code official on how to measure the height. The matter did not come up again until the 7/13/11 meeting. *(Mr. Tracey cited the code [§230-52-A(2)] requirements for HAC.)*

HAC has the power to do a number of things. Among those, it can remedy the situation by modifying the structure or accept it the way it is, which is what HAC did. HAC considered arguments from the applicant and the objector before rendering its decision. At the 7/13/11 HAC meeting it was requested again that the building be remedied by reducing the building in height by as much as 9 in. The building must be compatible with the Colonial period in New Castle history and no argument was received in this meeting disputing this. Measurements on the height of the building from both engineers were reviewed. Mr. Heckrotte (HAC) asked Mr. Marin and their engineer what the actual visible difference was between the house as constructed, assuming the height of 33 ft., 7 in. is accurate. The difference was stated to be 1/6ths of a degree, or the width of one roof top. Mr. Heckrotte added that in the past HAC has modified previous edicts.

Mr. Tracey noted an existing window in the bricked-up building that was not centered as it should have been and the applicant was required to move it 3-4 in. in accordance with HAC's requirement. Mr. Heckrotte mentioned in the 7/13/11 meeting that HAC had not been clear on the subject of height or the elevation to measure from. The difference of the

height on the approved structure as built and the building on paper is imperceptible. It is in compliance with city code and no difference in appearance.

This Board must decide whether HAC acted contrary to law or in an arbitrary or capricious manner when making its decision on 7/13/11. *(Mr. Tracey noted four [4] cases, all involving the New Castle County Board of Adjustment to support his argument.)*

Mr. Tracey noted there was communication with the city regarding the height and given guidance from the city on how to measure, presented those plans to the city showing the height at that time and was not told to stop construction at that time. Ms. Monigle was one of the biggest proponents to approve the building at its current height of 33 ft., 7 in. Ms. Monigle clearly referred to HAC's standards as to what fits in the colonial district and she and other members of HAC determined that shifting the height of this structure by 9 in. would not negatively impact the colonial district. Several HAC members (Messrs. Hentkowski, Heckrotte, McDowell, Ms. Monigle) did not feel anything was to be gained by determining the roof needed to be lowered by 9 in.

From reviewing the record, reviewing the decision, reviewing the comments from HAC, their decision was based on the real world. They had the power to demand the height be lowered as much as 9 in. but chose not to do so. Mr. Tracey closed his testimony.

Mr. Marin said it was represented to this board two (2) months after the 2009 HAC decision the height of the building was 33 ft., 7 in. He continued that HAC's decision was based on lack of facts and evidence concerning hardship presented to HAC from the property owner.

(Mr. Losco provided options the Board can take before making a decision.)

Mr. Athey finds it difficult to get "hung up" on 3 in. on a building of this size. Concerning the matter of monetary hardship and the lack of it being presented does not – common sense argument. The language used in the motion ("whatever" used twice) in the 7/13/11 meeting was unfortunate, but the background behind the motion makes sense. He does not see an intentional act on behalf of the applicant. Perhaps there is a code interpretation issue that is unfortunate, but nothing intentional. He believes that HAC reviewed and weighed the evidence presented to them and made a decision, which is their duty. He does not see any procedural issues with the manner that HAC made its decision and he does not believe this Board should overrule their decision.

Mr. Barthel agrees with Mr. Athey's statements adding that he does not believe HAC acted in an arbitrary or capricious manner. They took the time to look at the building and based their decision on a real-world situation. They determined the building is within code and that 9 in. was not going to ruin the historical aesthetic of the building. He does not feel that 9 in. is a hardship to Ms. Klyce as presented. The argument presented tonight is more of a principled argument rather than reality.

Mr. Athey made a motion to affirm the decision of HAC of 7/13/11 based on evidence presented this evening and the rationale he has stated. Mr. Barthel seconded the motion. There was no further discussion. The motion was approved.

The hearing was adjourned at 8:30 p.m.

Respectfully submitted,

Debbie Turner

Debbie Turner
Stenographer

Exhibits

- K1 – Anthony Janaman v. New Castle County Board of Adjustment & John David Chadwick
- K2 – Albert J. & Patricia Riedinger v. Board of Adjustment of Sussex County, Dominic A. Marra & Leslie D. Marr
- K3 – Special HAC Meeting (7/13/11) minutes as prepared by Veritex National Court Reporting Co.
- K5 – Drawings (8/20/07; 1/7/09; [2] 4/8/09)
- K6 – Apex Engineering Report from Jim Lober, P.E. (3/11/11)
- K8 – Excerpt of HAC Meeting (4/30/09) – Todd Breck, Architect
- K9 – Excerpt of Board of Adjustment (6/23/09) – Katherine Klyce & John P. Wheeler, III
- K10 – Excerpt of HAC Meeting (4/30/09)

- M1 – Email (12/10/10) Re. building height & corrected survey plan
- M2 – HAC Minutes (1/20/11)
- M3 – HAC Minutes (3/17/11)
- M4 – HAC Minutes (4/21/11)
- M5 – HAC Minutes (5/19/11)
- M6 – HAC Minutes (6/16/11)